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IN THE
Supreme Court of the United States

October Term, 1989

TEXACO, INC.,
Petitioner,

v.

RICKY HASBROUCK,
d/b/a RICK'S TEXACO, *et al*,
Respondents.

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

Texaco frames questions for review which are argumentative and not reflective of the facts presented at trial. Stated without argument, Texaco's petition raises the following questions for review.[1]

1. Where a seller knows before the sale that its wholesaler customer is reselling to retailers at a price below that which the seller charges competing direct-purchasing retailers, and direct-purchasing retailers are injured thereby, is the seller immune from liability for such injury under the Robinson-Patman Act merely because the party injured is the seller's retailer customer rather than a retailer supplied by the wholesaler customer?

2. Is the "competitive effects" element of the Act satisfied where there was a substantial, long-standing discrimination in price between plaintiffs and the favored buyers, and direct evidence that plaintiffs and others similarly situated lost sales because of the discrimination?

3. In awarding damages for a violation of the Robinson-Patman Act, may the jury consider evidence of what prices the favored and disfavored buyer would have been charged in the absence of the violation, or must the jury assume that, absent the discrimination, the supplier would have charged the favored buyer a higher price?

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[1] Respondents do not agree that these issues have been properly preserved by Texaco. *See* Argument, *infra*.

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STATEMENT OF THE CASE

A. Introduction.

The facts discussed hereafter tell the following simple story. In 1972 and 1973 the public in Spokane saw Texaco-branded stations posting significantly lower prices on the street than the plaintiffs. Because the public did not know that the lower priced stations purchased gasoline below the plaintiffs' cost, their conclusion was that the plaintiffs were price gougers, "high priced." Loyal customers and friends stopped doing business with the plaintiffs because they could buy Texaco gas for less from stations that appeared no different from those of the plaintiffs. When asked to explain the differences in retail prices, the plaintiffs had no satisfactory answer because they didn't know that the competing stations bought Texaco gasoline at lower prices.

Sales volumes at the lower priced stations soared, and the plaintiffs' sales stagnated. When asked how this could be, Texaco's representatives told the plaintiffs they simply weren't trying hard

enough, that they should combat this unfair competition with more service and smiles and cleanliness. But these intangibles could not arrest the natural tendency of the consumer to follow price, especially when the product was identical. Shortly after the prices at these competing stations again approached their costs, the plaintiffs filed suit against Texaco and proved that the root cause of the disparity in retail prices was price discrimination — rank favoritism in price to large chain purchasers.

When confronted with this suit, Texaco raised numerous defenses. It said the plaintiffs had caused their own dilemma because they were full-service stations. But this was untrue; it ignored the fact that several of the plaintiffs had tried to operate as self-service stations even without a competitive buying price, and the fact that Texaco had told the plaintiffs to meet the price competition by working harder and giving better service. Texaco also said the lower price was justified by Texaco's cost savings, and was extended to meet an offer from a competitor. But cost justification was dropped as a defense, and there was no basis for the meeting competition claim. Texaco said "the price is justified by functions that the favored purchasers perform." But that also proved untrue; the favored purchasers' functions were the same as those performed by the plaintiffs. And, finally, Texaco said "your real complaint is with the unbranded market, not us." But this simply denigrated the long-standing loyalty to the brand that said "you can trust your car to the man who wears the star," and ignored the fact that Texaco secretly subsidized the unbranded competition in Spokane by selling to Gull Oil Company at huge discounts.

When these defenses were held up to the bright light of a jury's common sense, they were properly rejected. No credible reason for the rank favoritism was ever disclosed by Texaco. The jury, under proper instructions, judged Texaco's conduct and defenses and found them wanting. Now, still having no legitimate reason for its conduct, and having no comfort in the facts and instructions presented to the jury, Texaco asks this Court to grant it refuge from the law that so plainly proscribes its conduct. Today, after fourteen years and two jury trials, Texaco has no better argument.

The question before this Court is whether the district court properly denied Texaco's motion for judgment notwithstanding the verdict. There is no fact issue or jury instruction raised by the questions presented. The plaintiffs claimed and proved that competing Texaco stations bought Texaco gasoline below the plaintiffs' costs, which caused the plaintiffs to lose sales and profits. In defense, Texaco has painted a deceptively simple and misleading picture of the facts. It suggests that only legitimate, garden-variety "functional" discounts to "pure wholesalers" are involved. In fact, this case involves nothing of the kind. The price discounts here (1) were arbitrary and unjustified, (2) were substantial in size, (3) favored large chain retailers, and (4) had the direct and foreseeable effect of diverting substantial sales from the plaintiffs, (5) with Texaco's full knowledge and encouragement.

B. Texaco's Gasoline Distribution in Spokane.

The plaintiffs are twelve individuals who operated Texaco gasoline stations in Spokane, Washington. Texaco sold gasoline to them at a "retail tank wagon" ("RTW") price. Texaco also sold gasoline to two other firms — Gull Oil Company and Dompier Oil Company — at fixed discounts off the RTW price. Gull, which marketed gasoline under the "Gull" name, bought at a discount of 4¢–6¢ per gallon below the plaintiffs' cost from Texaco. JA 31-32. Dompier, which marketed under the "Texaco" brand, bought at a discount of 3.65¢–3.95¢ prior to 1977, and 2.65¢ thereafter. JA 24, 29-30. Contrary to Texaco's assertion, both Gull and Dompier sold gasoline at retail in direct competition with the plaintiffs throughout the 1972–1981 period involved in this case. Dompier also sold to other retailers who competed with the plaintiffs.

1. The Plaintiffs. Most of the plaintiffs leased their service stations from Texaco. They purchased gasoline from Texaco under written contracts which called for Texaco to deliver gasoline to their stations. They competed with other Texaco-branded stations and with other brands, including Gull.

2. Gull Oil Company. Gull operated or supplied 15 stations in Spokane during the period covered by the lawsuit. The Gull stations

included "commission" stations and "consignment" stations. In both instances Gull owned the station location or controlled it by lease. In "commission" stations, Gull sold gasoline directly to the consuming public, setting the price and paying commissions to the station operators. In "consignment" stations Gull owned the gasoline in the station's storage tanks, and title "passed" to the customer as the dealer pumped the gas into a customer's tank. Thus, Gull was retailing in direct competition with the plaintiffs throughout the 1972-1981 period involved in this action. Ex. 385; JA 96-99, 103, 504-512.[2]

Texaco referred to Gull as an "unbranded distributor." However, its contract with Texaco did not require Gull to perform any specific functions; did not limit the discount to gasoline Gull resold at wholesale; and nowhere referred to Gull as a "distributor" or a "wholesaler." The contract was terminable by Texaco at any time on six months' notice. Ex. 79. Gull had no bulk plant for inventorying gasoline, and instead delivered gasoline directly from the Texaco pipeline terminus to its retail stations. JA 379. It had only one employee in Spokane other than two truck drivers, one of whom was a part-time worker. JA 101-103.

Gull was an aggressive retail marketer, and had a policy of setting its retail prices below "major" brand prices. JA 106. It was Texaco's policy to conceal the fact that it was selling gasoline to Gull. Thus, the plaintiffs, and most of Texaco's own employees, did not know that the gasoline being sold through Gull stations came from Texaco. JA 256; R 1424, 1643.

3. Dompier Oil Company. Texaco referred to Dompier Oil Co. ("Dompier") as a "branded distributor." Texaco traditionally extended a "branded distributor" discount to wholesalers whose intended function was to inventory gasoline in their bulk plants and make deliveries out of their inventory to commercial and small retail

[2] Gull operated five commission stations from the beginning of the 1972-1981 period, and added three other commission stations in 1975, for a total of eight. Four other consignment stations were changed to commission operation in 1975. JA 504-512.

accounts, usually in rural areas, to which Texaco could not, or did not wish to deliver gasoline. The distributor discount was intended to compensate the distributor for performing these functions. Ex. 1; JA 410-411. However, Dompier's contract, like Gull's, did not require Dompier to perform any specific functions; did not limit Dompier's discount to gasoline Dompier resold at wholesale; and did not otherwise condition Dompier's right to receive the price discount. And, like the Gull contract, the Dompier contract was terminable by Texaco at any time. Exs. 81-83.

The contract required Texaco to deliver gasoline to Dompier at its bulk plant. Notwithstanding this, Texaco permitted Dompier to pick up the gasoline at the Texaco pipeline terminus, and paid Dompier a "hauling allowance" which was intended to cover Dompier's cost of transporting the gasoline from the pipeline terminus to its bulk plant. JA 27-28, 186-187, 411-413; R. 2074. In practice, however, Dompier hauled the gasoline directly from the pipeline terminus to its stations; it rarely, if ever, first delivered the gasoline to its bulk plant.[3] Although Dompier was not doing the hauling for which the hauling allowance was intended, Texaco nonetheless paid Dompier the allowance on all gasoline it purchased. JA 123-128, 189-192. Contrary to Texaco's assertion, Pet. Br. 8, the hauling allowance was of sufficient size both to cover Dompier's costs of delivering gasoline to its stations and to pay Dompier a profit. JA 126, 128.

a. Dompier's Retail Sales Through Its Own Stations. Although nominally labeled a "distributor," Dompier sold at retail throughout 1972-1981. Initially Dompier retailed through two Texaco-branded service stations owned and operated through a sister corporation, Red Carpet Car Wash, Inc., which was wholly owned by John K. Dompier (who also owned Dompier), and which had the same

[3] This would have been a futile act, because the bulk plant had only 6,000 gallons storage for premium, 10,000 gallons storage for regular and no storage for unleaded — less capacity than many of the plaintiffs' stations. JA 123-128, 189-192, 449. A delivery truck held 9,400 gallons making this storage meaningless. JA 131.

officers, directors and address as Dompier.[4] In 1974 Dompier also began to purchase and operate the retail stations it had previously supplied. Texaco encouraged Dompier to do this.[5] As a result, by the mid-1970's gasoline had become 75–80% of Dompier's total business, almost all of which was sold through retail stations which competed with the plaintiffs. JA 114-116. By 1978, Dompier was operating six Texaco retail stations plus the two "Red Carpet" Texaco stations. JA 483–503, 132–33, 119–120.

b. Dompier's Sales to Customers Competing with the Plaintiffs Pre-1974. Dompier began its relationship with Texaco as a "full-line" distributor in the early 1960's. Initially, it sold only distillates and lubricants, but in the mid-1960's it also began to sell gasoline. JA 114-115. At first Dompier performed the functions of the traditional branded distributor, selling to commercial accounts and small retail stations in rural areas. However, in response to encouragement from Texaco Dompier changed its business to the supply of several large, high-volume retail stations in Spokane. JA 74–75, 116, 424–434, 489–493; Exs. 751–755.

This was part of a program which Texaco instituted to increase its sales volume by increasing retail sales through wholesalers. The program included assisting wholesalers to start three new retail stations in the Spokane market. JA 424–434. Texaco's supervisors were instructed to become involved in the wholesaler's retail sales,

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[4] JA 119–121, 139, 146–148, 150–151, 183–186. John Dompier supervised the operations of both Red Carpet and Dompier, and set both the price at which Dompier sold gasoline to Red Carpet and Red Carpet's retail price. Dompier "sold" to Red Carpet at a price 2¢-3¢ below the RTW price Texaco charged the plaintiffs. The Red Carpet stations carried the Texaco brand, accepted the Texaco credit card and sold Texaco motor oil. JA 127–128. One plaintiff, Harold Hardwick, was told by his Texaco representative that he would have to set his retail price one-half cent over his cost to compete with Red Carpet. R. 1250–51. *See also* R. 253–254.

[5] JA 116-118, 172-174, 424–434. Texaco's Spokane management encouraged Dompier to purchase more stations even if it was necessary to pay above-market prices for them, telling Dompier that "a thorn might turn into a rose." JA 173-174.

and to assist wholesalers in opening their own retail stations as a means of accomplishing the increase in sales volumes:

> With the Wholesaler you should now spend the remainder of the day determining his plans for expanding sales volume through the acquisition and/or conversion of competitive retailers and consumers. You should investigate the possibility of retail service station development through first party leases, assisting the wholesaler in selecting desirable sites.
>
> It is extremely important for supervisors to determine prospective competitive accounts which the Wholesaler is presently soliciting. He should render any possible assistance by accompanying the Wholesaler on actual sales calls, assisting in the solicitation. JA 444.

This program had remarkable results in Spokane in 1972 and 1973. Dompier dramatically increased its sales by passing on all or most of its price discount from Texaco to the Texaco branded stations it supplied. Dompier sold to the stations at prices 2.65 to 3.45 cents below plaintiffs' cost from Texaco. JA 329–338; R 809–810; Exs. 471, 791, 788, 789, 792, 800, 804. Dompier's customers then used their lower price to sell at lower retail prices which were often barely above plaintiffs' cost. JA 267–270, 329–338.

The pass-through of the Texaco price discount to Dompier's stations dramatically altered the retail marketing of gasoline under the Texaco brand in Spokane. Between 1970 and 1972, Dompier's monthly volume of gasoline sold at the retail level tripled. JA 487. Whereas Dompier's customer stations averaged sales of 25,000 gallons a month in 1970, in 1972 they averaged 65,000 gallons a month. JA 487. By the first six months of 1975, Dompier's eight stations were outselling 19 stations which Texaco supplied directly by more than 70,000 gallons per month. JA 488. It only remained for Dompier to complete the destruction of the plaintiffs' market by acquiring the stations it supplied and using its entire wholesale discount at the retail level. JA 132–133, 151–154.

Texaco knew that its effort to increase sales volume was being accomplished by Dompier's pass-through of its discount to its

customers, who in turn posted lower retail prices. A Texaco sales supervisor testified that Texaco knew in 1971 that Dompier was passing on its discount and that its customers were posting prices several cents below direct-buying retailers. JA 329-337, 233-234. Another Spokane sales supervisor observed:

> . . . large growth in volume occurred with our Distributor in 1972. This was primarily due to the type of retailing done by accounts supplied by Dompier. By and large, Dompier switched from supplying traditional full serve accounts to complete self serve operations based on price retailing.

JA 489. A Texaco vice president for marketing admitted that other wholesalers also passed on the discount:

> Some wholesalers are selling retailers at significant discounts to assist them in being competitive at the pump and maintaining volume, often taking the hauling allowance and little more as their wholesale profit.

JA 478. In Spokane, Texaco's personnel referred to Texaco's dual pricing system in Spokane as a "two-headed snake" which, because of the discount, was causing the plaintiffs to lose sales to distributor stations. JA 268-271.

c. The Dompier Retail Stations. The stations which Dompier operated and supplied all carried the "Texaco" brand and were authorized to accept the Texaco credit card. They were not all self-service stations, as suggested by Texaco.[6] Some of the stations were self-service stations, and at others attendants pumped the gasoline. JA 155, 163-164. There were no differences in appearance or operation between the plaintiffs' stations and the Dompier stations. JA 379; CR 89. The stations, like the Gull stations, competed directly with the plaintiffs. R 1483-84; JA 265-269; Exs. 27, 794.

[6] Nor were the plaintiffs' stations all full-service stations, as Texaco suggests. JA 55-56; R. 253, 317-319, 403-404.

C. Texaco's Discounts to Gull and Dompier Were Not "Legitimate Functional Discounts" or Uniform Discounts to "Pure Wholesalers."

Gull and Dompier received lower prices simply because Texaco gave them the "distributor" label.[7] Texaco's assertion that the facts showed only "uniform" and "legitimate" "functional discounts" to "pure wholesalers" is a hypothetical construct which is far removed from reality.

1. The Discounts Were Not "Pure Wholesale" Discounts. Texaco's management personnel testified that a distributor who was retailing should not receive a distributor discount. JA 67-68. But they also acknowledged that, in practice, the fact that a distributor was retailing was irrelevant to whether he received the discount. JA 69-70, 79, 220-21, 338. Texaco had no objective guidelines or periodic reviews for determining whether a "distributor" was truly selling as a wholesaler or performing distribution functions, JA 338, and Texaco's wholesale sales manager knew of no instance when Texaco discontinued a discount because a "distributor" was no longer a true wholesaler. JA 68. Since Texaco gave Gull and Dompier the discounts on gasoline they resold at retail, there is no basis for Texaco's assertion that its discounts were pure wholesale discounts.

2. The Discounts Were Not Based on Functions Performed. The discounts also were not "functional discounts." Neither the Gull nor the Dompier contract conditioned receipt of the discount on, or otherwise required performance of any functions. The issue of whether Gull and Dompier performed wholesale functions was vigorously contested at trial, and resolved against Texaco, and the trial court and court of appeals both found there was abundant

[7] There were no relevant differences between the requirements of the plaintiffs' contracts and the Gull and Dompier contracts. The principal differences were (1) the price discounts to Gull and Dompier, and (2) the fact that the plaintiffs had to pay C.O.D., whereas Texaco extended credit to Gull and Dompier. Compare Ex. 661 with Exs. 79, 81.

evidence that Gull and Dompier performed few, if any, functions which the plaintiffs did not also perform.

For example, Gull functioned almost entirely as a retailer and, except for the delivery function, performed no functions and had no costs which the plaintiffs did not perform or have. Dompier had abandoned the role of inventorying gasoline and distributing it in small loads to commercial or small retail customers, and it needed none of the discount to cover the cost of delivering gasoline to its stations because the hauling allowance fully covered that cost plus a profit.[8] Aside from this delivery function, for which it was compensated, Dompier performed no functions and had no costs different from those of the plaintiffs. This was true both when Dompier resold at retail[9] and when it resold at wholesale to retail stations. Dompier's ownership of a bulk plant, although nominally a traditional wholesale function, was irrelevant to its sales to or through retail stations because Dompier did not need the bulk plant, and rarely if ever used it to deliver gasoline to the retail stations. JA 122-126, 187, 189-192. Moreover, when selling at wholesale to other retailers, Dompier performed no other functions, such as counseling dealers; aside from delivering gasoline (for which it received the hauling allowance), its sole "function" was to take the stations' telephone orders for gasoline and pick up their payments. JA 157.

Texaco knew Dompier was not performing the functions for which the distributor discount was intended. Indeed, it observed the same phenomenon in other locations besides Spokane. Texaco's vice-president, now its Chairman, observed:

> For many years, we have sold gasoline to distributors at a discount of approximately 3½¢ per gallon from the price charged our independent retailers. This discount was traditionally justified by the many important services distributors performed when they physically "distributed" this gasoline among many customers, most of whom required small volume deliveries. These traditional functions continue to be performed by most of our distributors operating in rural areas, who serve various farm and other small volume accounts including service stations. . . . On the other hand, urban distributors have significantly changed their methods of operation over the past few years. . . . These distributors are shedding many of their traditional functions and have concentrated their sales in very high volume outlets. This has reduced their per gallon overhead cost to the point where a good portion of the discount is not being utilized to defray their costs of distribution at all.
>
> In addition to this traditional discount, many of these distributors have been obtaining added savings through the manipulation of their hauling allowance. . . . This amount can provide a significant marketing advantage to a distributor when he is not, in fact, incurring the cost of hauling the gasoline to his bulk facility.

JA 410-413. This description of retail sales by distributors was presaged by Texaco's program to increase such sales started in the early 1970's.

Texaco's vice-president for U.S. sales also acknowledged that distributors were abandoning their traditional functions. JA 343-344. He testified that there was no logical rationale for the price to a distributor to be keyed to the RTW price since different distributors provided different services, and had urged Texaco to adopt a "distributor tankwagon" pricing system under which a distributor's entitlement to a discount would depend on the services he performed. JA 340-344. However, Texaco changed nothing in response to his recommendations. Indeed, in 1976, Texaco questioned whether Dompier was performing wholesale functions but renewed Dompier's distributor contract anyway. R. 1087-89; JA 447-448. There was ample evidence to support the jury's rejection of Texaco's argument that its discounts to Gull and Dompier were "legitimate functional discounts."

[8] Texaco's vice-president testified that distributors like Dompier who hauled gasoline straight from the pipeline to retail stations abused the function of the hauling allowance. R. 2075. *See also* JA 408-412.

[9] Dompier's president acknowledged that Dompier needed no wholesale salesman to "sell" gasoline to itself, had no wholesale credit risks in "selling" to itself, and had no inventory or administrative expenses different from those of the plaintiffs. JA 156.

3. The Discounts Were Not Available to Others Similarly Situated. Wholesale functions or classifications were also irrelevant to Texaco's pricing because Texaco refused to make discounts available to other purchasers who were willing and able to perform the same functions as Gull or Dompier, or who resold in the same way as Gull and Dompier. A discount based on a purchaser's performance of distribution functions should logically be available to any purchaser willing to perform the same functions. Likewise, a discount based on a buyer's "class of trade" (*i.e.*, the nature of the customer's reselling) should be available to all buyers who resell in the same way. Here, neither was the case. Although Gull and Dompier performed no functions other than to deliver gasoline (and Texaco paid Dompier separately for performing this function), Texaco refused to extend a discount to the plaintiffs when they wanted to haul their own gasoline. JA 38-41, 59. And although Gull and Dompier received the discount on gasoline they resold at retail, Texaco refused to extend the discount to other retailers. The discounts had no basis other than mere favoritism.

4. The Discounts Were Not "Uniform Wholesale Discounts." In its petition for certiorari, Cert. Pet. 5 n.4,7,9, Texaco represented that it charged uniform prices to wholesalers. Texaco and its supporting *amici* treat this alleged fact as controlling on the issue of liability, arguing that "compliance with the Act is assured" by this practice, Pet.Br.17, and that charging wholesalers uniform prices provides a necessary "safe harbor" for sellers. Pet.Br. 14, 16-17; U.S. Br. 16. At trial, Texaco never even raised this "uniform wholesale prices" argument. Therefore, evidence of Texaco's pricing to other wholesalers was not at issue and was not put into the record. However, the little evidence that is in the record on this issue indicates that Texaco's contention that it charged uniform prices to wholesalers is not true,[10] and discovery in the case confirmed this.

[10] Texaco had other wholesalers called a consignee and a tank truck dealer in Spokane, each of which was charged different prices. *see, e.g.*, Ex. 178, and Texaco's wholesale sales manager testified that distributors did not receive the same discount. JA 71. Texaco did not even charge the same distributor a uniform price. For instance, Texaco gave Gull and Dompier additional temporary discounts for some stations and not others depending on the competitive conditions in the area of the retail station. R. 799-805; Exs. 27, 50, 132-135, 495, 498; JA 450-474.

For instance, a 1974 "Texaco Distribution Data Sheet" marked as Exhibit 73 (but not offered into evidence) showed that one distributor in the Spokane District paid 35.75¢ per gallon while another paid 31.25¢; that distributors in the same state had different discounts; and that wholesale discounts in the Portland Region ranged from 3.6¢ to 4.5¢ off RTW.

Thus, if charging a uniform price to wholesalers is significant to the issues in this case, the record was not developed and could not have been developed. If the significance of the issue is that uniform prices are charged to *competing* wholesalers to avoid price discrimination claims by other wholesalers, such a record likewise was not developed and did not exist here. Gull and Dompier were both wholesalers in Spokane, but were charged different prices. And if Texaco is referring to uniform prices only to competing *branded* distributors, there were no competing branded distributors here. Texaco had only *one* branded distributor (Dompier) in Spokane. Indeed, Exhibit 73, discussed *supra*, shows that Texaco had only two other branded distributors in the entire Eastern Washington/Northern Idaho area. One was located in Yakima, Washington, approximately 200 miles from Spokane. The other was located in Pierce, Idaho, a rural area in the Clearwater Mountains north of Weippe three to four hours from Spokane. Finally, at trial, Texaco never claimed that it gave Dompier discounts because of a uniform pricing system installed to avoid price discrimination claims.

Charging uniform wholesale prices, even if true, has no significance for purposes of the Robinson-Patman Act where the seller also sells directly to retailers. However, if Texaco is now contending that it does, and that it charged all wholesalers the same price or gave them all the same discount, it should affirmatively so state to the Court. A decision by this Court should not be based on an assumed fact which has not been addressed, established, or preserved as a defense.

D. Texaco's Price Discrimination Caused Sustained and Substantial Injury to Plaintiffs and to Competition.

The Gull and Dompier stations were located close to the plaintiffs' stations, on or near the same traffic arterials. Exs. 27, 385, 513, 177, 794; App. B.[11] R 396-399, 730-731, 650, 1190-1194, 1438-1441. Because of its relatively small geographic size and the pattern of its streets, Spokane has substantial cross-city traffic, and there was competition among stations over relatively broad areas. JA 244, 283-291; R. 498, 1715-1721, 2908-2909, 1824, 2918-19. Gasoline prices in Spokane tended to move citywide. JA 104-106.

Because of their lower buying prices, the Gull and Dompier stations posted retail prices substantially below the plaintiffs' prices. Gull's policy was to price below the major brand stations, and at levels comparable to aggressive marketers, including Dompier. JA 106, R. 708-09. The Dompier stations usually priced below any competing stations, and Dompier was considered by Gull to be one of the two most aggressive marketers of gasoline in Spokane. JA 106-107. There was extensive testimonial and documentary evidence that the stations owned or supplied by Dompier, because of their price discount, often sold at retail prices barely higher than the RTW price the plaintiffs had to pay Texaco. Exs. 471, 654-657A, 800, 804, 791, R 315, 1250-51, 253-254, JA 166-167, 330-332. Dompier's president testified that Dompier would have been forced to increase its stations' retail prices if Texaco had removed its price discount, R. 853-854, and that a plaintiff could not post prices at Dompier's level because, if he did, "he would probably go out of the gasoline business." JA 166-172.[12]

Although it was impossible to prove where all of the plaintiffs' former or potential customers bought their gasoline, the plaintiffs

[11] Appendix B is a map of Spokane which identifies the locations of the plaintiff, Gull and Dompier stations.

[12] As an example, from Dompier's own records he calculated that in November 1975 Dompier made a gross profit of $7,567.83 on the sale of 162,749 gallons of gasoline at its Freya Street station, but that a plaintiff who tried to sell at the same retail price as the Dompier station could only have made a gross profit of $1,139.24. Ex. 909; JA 166-172.

produced many Spokane residents who testified that they discontinued purchases from the plaintiffs because the Dompier stations had lower prices.[13] In addition, several of the plaintiffs could identify specific customers lost to Dompier because they observed the customers in the Dompier stations, saw Dompier credit card invoices in customers' automobiles when servicing them, or because disgruntled former customers complained that the plaintiffs' prices were higher than Dompier station prices. JA 268; R. 238-243, 315-318, 401-403, 530, 600-01, 657-58, 1558, 1244-45, 1285.

The results of this competitive situation were dramatic. Between 1970 and 1975, Dompier's monthly sales volume almost tripled (from 155,152 gallons to 462,956 gallons), while Texaco's monthly "throughput" gallonage in Spokane (*i.e.*, gallonage sold to Texaco dealers such as the plaintiffs) fell from 569,269 gallons to 389,557. Ex. 215, JA 487-503; R. 1089-1090. Whereas Dompier accounted for only 20.7% of the Spokane District monthly retail volume in 1970, only four years later its share had grown to almost 50%. JA 483, Ex. 215. The share of independent retailers, however, declined from 76% to 42%, *id.*, and the plaintiffs' sales either declined or showed little or no growth. JA 483-503; Exs. 128, 374, 645, 648-657, 709-721. Eight Dompier stations were outselling 19 independent dealers, and by 1978 seven of the 13 plaintiffs' stations had closed. JA 483-500; Exs. 709-721. Similar growth occurred with the Gull stations. Between 1973 and 1976 (the years for which complete Gull volume data was available), Gull's retail volume increased 87%. Exs. 762-764, 769.

E. Texaco Knew Its Price Discrimination Was Injuring The Plaintiffs.

Texaco misleadingly pictures itself as an unknowing and helpless victim of independent pricing decisions by Gull and Dompier.

[13] Appendix A to the plaintiffs' brief in opposition to the petition for certiorari sets forth a summary of the competitive injury evidence. *See also* R. 473-480, 634-640, 1154-1158, 1170-1174, 1329-1332, 1343-1346, 1353-1355, 1535-1539, 1593-1597, 1601-1605.

This is far from the truth. As shown *supra*, Texaco actively encouraged and helped Dompier to change its business to retailing, knowing that the discount was Dompier's means of doing so. Numerous exhibits and witnesses, including Texaco's own management employees, confirmed that Texaco knew its pricing practices were injuring retailers such as the plaintiffs, both on a local and a national level.

For example, Texaco's vice-president, now its Chairman, stated that Texaco distributors were not performing wholesale functions, and that "a good portion of the [distributor] discount is not being utilized to defray [distributors'] costs of distribution at all." JA 410-412. He concluded that *the distributor discount was the cause of the independent retailers' losses:*

> We believe that the dramatic shift in gasoline sales from the independent retailer classes of purchaser to the independent distributor classes of purchaser can be explained almost entirely by the magnitude of the distributor discount and the hauling allowance. We believe that they are inconsistent with the realities of gasoline marketing today.

JA 407-413. A Texaco marketing department report concluded that direct-buying retailers could not compete effectively against distributor retail stations even if they converted to full or partial self-service operation. JA 475-480. And another Texaco vice-president admitted that the distributor discount was the "root cause" of "rampant and alarming" increases in sales at distributor stations at the expense of direct-buying dealers. JA 213-215, 217-218, 222-223, 227, 232; Ex. 2, JA 414.

In Spokane, Texaco's officials knew the distributor discounts were being passed on to retail stations, and drew the identical conclusion about the effects. A Texaco sales representative stated that Dompier had a marketing advantage over independent retailers "with which they cannot compete." JA 483-493. Another Texaco sales representative said the Dompier stations were the plaintiffs' principal competition, and that the plaintiffs could not compete with those stations due to Dompier's discount. JA 265-267, 331-337. However, when the plaintiffs repeatedly complained to Texaco about

the prices of the Dompier stations, JA 268; R.1555, 734-735;[14] and asked Texaco how the Dompier stations could price so low, Texaco's sales representatives lied in response, saying they "didn't know why . . . couldn't understand it." R. 401-404.

While hiding the truth from the plaintiffs, Texaco's management personnel in Spokane knew the price discrimination was the cause of the plaintiffs' losses. Texaco's Spokane management referred to Texaco's dual-distribution pricing in Spokane as a "two-headed snake" and believed that "sooner or later Texaco was going to have to make a decision as to which method of marketing they wanted to pursue" because "they [the two methods] were in conflict." JA 268-271.[15]

F. Plaintiffs' Damages Evidence.

The law entitles a plaintiff to recover the sales and profits he would have gained had there been no discrimination. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981). Plaintiffs presented the testimony of an economist, Dr. Keith Leffler of the University of Washington, who was uniquely qualified to testify in this case.[16] Dr. Leffler studied the Spokane market, the

[14] The plaintiffs did not complain to Texaco about the prices at the Gull stations since Texaco concealed the fact that it sold gasoline to Gull. *See, e.g.*, JA 256, R. 1424, 1643.

[15] Why Texaco failed to address the problem was unclear, at least to Texaco's Spokane personnel. The evidence indicated that one reason was Texaco's desire to increase its overall sales volume, even at the expense of independent dealers such as the plaintiffs. Exs. 11-14. An ex-FTC official suggests the reason was that Texaco was unfairly profiting from economic price discrimination. Celnicker and Seaman, *Functional Discounts, Trade Discounts, Economic Price Discrimination, and the Robinson-Patman Act*, 1989 Utah L. Rev., Vol. 4 (forthcoming Nov. 11, 1989).

[16] Dr. Leffler had served as chief economist for the FTC's study of the effects of the proposed merger of Standard Oil of California and Gulf Oil Company on wholesale and retail gasoline markets. R. 1699-1700, and as an economist in antitrust litigation brought by the Northwest states and others involving gasoline marketing. In connection with the latter case, he had studied the wholesale and retail gasoline market in Spokane before he was engaged in this case. R. 1700-1702.

trial testimony and exhibits, and relevant data, including data on the sales volumes and prices of the plaintiffs, Dompier and Gull. Based on that study, he concluded that the plaintiffs had been injured — *i.e.*, lost sales and profits by reason of Texaco's price discrimination in favor of Gull and Dompier.

Plaintiffs did not, as Texaco suggests, Pet. Br. 9, claim injury only from Dompier. There was substantial evidence of the significant price advantage enjoyed by Gull and the large volumes of gasoline it sold at lower retail prices in competition with the plaintiffs. Exs. 762–769; JA 106. Having proven the fact of their injury by reason of Texaco's discrimination in favor of both Gull and Dompier, Dr. Leffler measured the damages by utilizing available data for the plaintiffs' stations and four of the Dompier stations. His analysis focused on the four Dompier stations simply because insufficient price and volume data was available for other stations.[17].

Throughout its brief, Texaco misstates the basis of plaintiffs' claims for damages pre-1974. For example:

> the premise [of plaintiffs' damages] being that plaintiff retailers were entitled to price parity, not with the wholesaler's retailer customers, but with the wholesaler itself. (Pet. Br. 3).
>
> . . . For purposes of damages, plaintiffs did not claim they were entitled to be treated like Dompier's customers, their alleged competitors, but rather like Dompier itself . . . (Pet. Br. 9).
>
> . . . They did not predicate damages on the average . . . price reduction received by any Dompier customer . . . (Pet. Br. 10).

[17] JA 105–106. Comparison of the plaintiffs' stations and the four Dompier stations was reasonable and, if anything, conservative since Texaco gave Gull a considerably larger discount than Dompier, and Gull's own experience was that Gull needed only a one-cent price advantage to compete on a level footing with major brands. R. 703–704.

This assertion is wrong. The damage calculations for pre-1974 were based on the discount Dompier gave its customers, Ex. 804, *not* on the discount Texaco gave Dompier.[18]

Dr. Leffler did not measure the plaintiffs' damages merely by reference to the amount of the discrimination. As required by *J. Truett Payne*, he determined the sales and profits the plaintiffs would have gained if Texaco had not discriminated in price against the plaintiffs. R. 1736–47. The evidence showed that Texaco had considered eliminating the discrimination either by raising the distributor price, lowering the plaintiffs' price, or by a combination of the two. JA 480–481. Therefore, to determine damages Dr. Leffler had to consider what the plaintiffs' and the Gull and Dompier stations' buying prices would have been absent the discrimination. JA 296–300. Since the plaintiffs' sales were affected both by the level of the Gull and Dompier stations' retail prices, and by the level of the plaintiffs' own retail prices, Dr. Leffler also considered how the Gull and Dompier stations and the plaintiffs would have reacted in their retail pricing in response to an elimination of the discrimination. R 1738–1740, 1774–1776.

Using the best available data, Dr. Leffler performed a statistical regression analysis to determine the actual effects observed in the market (1) of changes in the retail prices of the four Dompier stations on the plaintiffs' sales, and (2) of changes in the plaintiffs' retail prices on the plaintiffs' sales. Using these observed effects, he

[18] In describing the price used for the damage calculation pre-1974, Dr. Leffler stated:

> . . . prior to July 1975 I used the supplied stations' price differential . . . . And prior to the allocation period it is a pass-on of whatever price differential was paid by the supplied stations, which is about two and a half cents.

R. 1797. Again when describing the price used in the damage analysis (Ex. 5551), Dr. Leffler said:

> Q. That would be Dompier's buying price then, that column? A. Well it is — before July 1975, no, it is the buying price of the stations he supplied. Q. Okay. A. And then after July '75 it is his buying price.

R. 1891. *See* R. 2131.

calculated the sales and profits which the plaintiffs would have gained in the absence of Texaco's price discrimination. *See* Section IV-C, *infra*. In so doing, he did not limit himself to the artificial assumption (argued by Texaco) that Texaco would have eliminated the discrimination *only* by raising Dompier's price by the full amount of the discrimination. Rather, consistent with *J. Truett Payne's* admonition that damages are to estimate "what plaintiff's situation would have been in the absence of defendant's antitrust violation," 451 U.S. at 566, Dr. Leffler calculated damages by taking into account the three possible ways that Texaco considered to eliminate the discrimination, and the ways the four Dompier stations and the plaintiffs from the evidence would have reacted to the elimination of the discrimination. R. 1737-1740, 1749-1773, Exs. 913-918. The resulting damages were very conservative; they represented an average of only $5,486.59 for each plaintiff for each year of the plaintiff's operation, and an increase of only several customers per day. R. 2928-32, Ex. 932.

G. Proceedings Below.

The jury's verdict was the second verdict for the plaintiffs in this case, which has now been pending almost 14 years. At the second trial, Texaco defended its price discrimination factually, on the basis of "wholesale functions" performed, cost justification, and meeting competition. Texaco abandoned the cost justification defense before the case was submitted to the jury, JA 364-365, R. 2814, 3321, and the jury rejected the functions and meeting competition defense after Texaco presented its evidence on those issues.[19]

[19] Plaintiffs nowhere conceded, as Texaco contends, that the jury's verdict must be reversed if Texaco's discounts were lawful in any portion of the damage period. Pet. Br. 12. Texaco disingenuously relies on a statement of plaintiffs' counsel which related to the Texaco lawyer's proposed closing argument on the meeting competition defense. The United States rejected Texaco's assertion as incorrect, and observed that "[plaintiffs'] concession . . . was explicitly limited . . . to the 'meeting competition' defense during a portion of the damage period. *See* TR 3165-66." U.S. Cert. Br. 16.

SUMMARY OF ARGUMENT

1. Texaco argues that a manufacturer which gives uniform discounts to purchasers who resell at wholesale must, as a matter of law, be exempt from the Robinson-Patman Act because a manufacturer will otherwise have to monitor its purchasers' costs, control their resale prices, and expose itself to wholesalers' price discrimination claims. There is no evidentiary foundation for this argument; Texaco's wholesale prices were not uniform, and Texaco recognized that it had several ways to eliminate the discrimination which were neither burdensome nor unlawful. Moreover, where a manufacturer is selling both to retailers and wholesalers, a "safe harbor" for charging uniform wholesale prices is a meaningless standard when judged in terms of the Act's language and purposes. Merely charging uniform prices to different wholesalers, particularly where some perform few, if any, wholesale functions, is no assurance that competition will not be injured, and is really not uniform pricing at all.

2. Texaco's proposed *per se* exemption for price discounts granted to wholesale resellers would require judicial amendment of the plain language of the Robinson-Patman Act. Under the Texaco rule, the size of the discount, its duration and its competitive effects would not matter. And the exemption would apply regardless of whether the discount satisfies the statutory cost justification defense; regardless of whether the recipient performs any functions which the manufacturer would otherwise perform; regardless of whether the discount is available to others who perform the same functions; and regardless of whether the discount, with the seller's knowledge, is passed on to retailers who thereby gain a competitive advantage against direct-buying retailers. Such an exemption contradicts the plain language of the Act; its unique purpose to provide small merchants equal competitive opportunities as far as price is concerned, *FTC v. Sun Oil Co.*, 371 U.S. 505, 520, (1963), and the heavy presumption against the creation of implied exceptions to the Act's application. *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 12 (1976).

3. Neither this Court nor the Federal Trade Commission has implied the kind of exception Texaco seeks. Economic substance and the existence of adverse competitive effects, not labels or the form of transactions, determines the legality of discriminatory pricing. *FTC v. Ruberoid Co.*, 343 U.S. 470, 475 (1952). The Act applies to discriminations in price between purchasers who do not compete, or who are at different levels of the distribution chain, if the discrimination causes the adverse competitive effects which are the touchstone of the statute. *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969).

4. This case does not present the broad issue Texaco raises. At most, it raises only a much narrower question involving the application of the Act to wholesale discounts where the supplier, before the sale, had actual knowledge that the discount would be passed on to retailers who thereby gain a competitive advantage over direct-buying retailers. Moreover, the jury's verdict was proper on the independent ground that Gull and Dompier competed directly with the plaintiffs as retailers.

5. No issue relating to the district court's jury instruction based upon *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), is properly before the Court. Texaco raised no objection to the instruction in either the district court or the court of appeals. Moreover, the logic of the *Morton Salt* inference of competitive injury applies regardless of whether a price discount was first granted to a wholesaler who passes it on to a competitive retailer. The jury was not required to accept the inference, and there was abundant evidence in the record to support the jury's finding that Texaco's price discrimination adversely affected competition.

6. In proving damages, a plaintiff may recover the sales and profits he would have made "absent the violation." *J. Truett Payne*, 451 U.S. at 565. He is not limited to the artificial assumption that the supplier would have cured the violation only by raising the price charged the favored buyer, as Texaco contends. Texaco considered eliminating the discrimination by raising the distributor price, lowering the RTW price, or a combination of the two. The jury appropriately decided, as a fact issue, how Texaco would have eliminated the discrimination, and awarded damages accordingly. This was entirely consistent with *J. Truett Payne* and did not amount to an award of damages in the amount of the discrimination.

ARGUMENT

I. The Petition Should Be Dismissed, or the Judgment Affirmed, Because This Case Does Not Present the Issue Texaco Raises.

Texaco complains that legitimate, garden-variety wholesale discounts are threatened by the court of appeals' statement that the Act may be violated if a wholesale discount is not cost-based and all or a portion of the discount is passed on to customers who compete with direct-buying retailers. Benign, garden-variety wholesale discounts were not involved here, and the court of appeals' result was correct with or without the questioned language. If the Court granted Texaco's petition to examine application of the Robinson-Patman Act to legitimate functional discounts, the petition should be dismissed, or the judgment affirmed, because this case does not present that issue.

A. Gull and Dompier Sold at Retail.

Because Gull and Dompier sold at retail throughout the damages period, the issue Texaco raises, and Texaco's argument, are not significant to the outcome of this case. In their first brief filed before certiorari was granted, the Justice Department and Federal Trade Commission reached this precise conclusion. U.S. Cert. Br. 16. They observed that "the jury may well have found liability on the theory that Dompier and Gull themselves competed with [the plaintiffs]," and that "there is no reason to believe . . . the verdict as to [Texaco's] liability would differ if this Court were to reverse and remand for a third trial." *Id.* at 17.

By failing to address the issue of Gull and Dompier's retailing, Texaco and the United States concede Texaco violated the Act when

it gave Gull and Dompier discounts on gasoline they resold at retail in direct competition with the plaintiffs. This conclusion is required by *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952), in which the Court held the Act applicable to wholesale discounts where the "wholesalers" *in fact* functioned as retailers. The Court held that the Federal Trade Commission was correct to disregard "ambiguous labels, which might be used to cloak discriminatory discounts to favored customers . . . ." *Id.*[20]

Recognizing this, Texaco strains to create a different issue by suggesting that the evidence showed only wholesale resales prior to July 1974. To make this argument, Texaco (1) conveniently ignores the evidence of Dompier's pre-1974 retailing through the Red Carpet stations, and of Texaco's extensive involvement in Dompier's expansion of its retail business; and (2) improperly casts aside the uncontested evidence of Gull's retailing throughout the damages period, claiming it was not really a part of plaintiffs' case, and "without present significance." Pet. Br. 6. But the plaintiffs presented substantial evidence of injury arising from Texaco's discounts to both Gull and Dompier. JA 283-286, R. 1738, 1292-1293, 1360-1361. The district court's instructions show clearly that the plaintiffs claimed damages for both, and the issue of liability for sales to Gull was presented to the jury. The plaintiffs were not required to measure their damages only by using data from Gull stations, particularly where, as here, sufficient data from the Gull stations was lacking.[21]

[20] *See Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 909 (7th Cir. 1973), *cert. denied*, 417 U.S. 911 (1974); Monograph: *The Robinson-Patman Act: Policy in Law, Volume I*, 59 (ABA, Section of Antitrust Law 1980); Schniderman *Price Discrimination in Perspective* (ALI/ABA 1977) ("the competitive realities govern, not the manufacturer's internal terminology. . . .").

[21] The record cited by Texaco to establish Gull's asserted irrelevance supports the contrary conclusion. Plaintiffs proved injury from Gull. R. 1711, 1713-1717, 1733, 1778, 1964-1965, 3061-3063. However, because there was not sufficient Gull data to measure the amount of damage, the amount of damage was limited to that measured by the four Dompier stations for which data existed. Having established the fact of injury, the plaintiffs were entitled to prove their damages by good and reasonable inference since, otherwise, the wrongdoer would profit by his own wrong. *J. Truett Payne*, 451 U.S. 565-566, quoting *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946).

Because Gull and Dompier were retailers in direct competition with the plaintiffs, the judgment can and should be affirmed irrespective of the outcome on the "wholesale discount" issue raised by Texaco.

B. Texaco's Discounts Were Not Functional Discounts.

The practice of extending legitimate functional discounts is not threatened, or even presented by this case. Texaco's discounts were not conditioned on the performance of wholesale functions. They were extended even though Gull and Dompier performed few, if any, wholesale functions, and were not made available to others willing to perform the same functions. Moreover, there was a complete absence of evidence that the discounts were justified by cost savings to Texaco, as would be expected in the normal wholesale situation. Legitimate functional discounts were not involved here. Moreover, the issue of whether Texaco's discounts were legitimate functional discounts was a fact issue which the jury resolved against Texaco, and which cannot serve as the basis for review in this Court.[22]

[22] The Justice Department and FTC apparently do not embrace the proposed *per se* exemption for sales to wholesalers as strongly as Texaco and the other *amici*. They carefully argue only for exemption of "legitimate" functional discounts. U.S. Br. 15, n.11. But this concept wholly ignores the statutory test of whether the discount adversely affects competition. So long as the recipient of the discount "performs *some* services for the supplier" (emphasis added), under the Government's test the inquiry is ended, regardless of the size of the discount, its effect on competition, or its lack of availability to other customers.

Moreover, the Government's definition of "legitimate" functions describes "wholesale" functions which were in fact performed by the plaintiffs to the same, if not more significant extent than they were performed by Gull and Dompier. The functions said to legitimize the discount are "physically delivering products on resale, managing inventory, or assuming credit risks not performed by firms further down the chain of distribution." Here, the delivery function was paid for by Texaco as a separate item from the discount. With respect to managing inventory, the record shows that the plaintiffs had more gasoline and product inventory than Dompier and Gull. JA 36, 122-123, 449; R. 309, 391-392, 449. And both plaintiffs and Dompier assumed credit risks. Thus, the question of whether the discount is "legitimate" is a question of fact to be resolved by a jury. It cannot be decided as a matter of law given the U.S. definition of "legitimate."

C. Texaco's Discounts Were Not Class of Trade Discounts.

Nor is the practice of extending uniform "trade discounts" to all customers who resell in the same way (*e.g.*, wholesale resellers and retail resellers) presented here. Texaco's prices to wholesale resellers in Spokane were not uniform, and Texaco gave Gull and Dompier "wholesale" discounts even when they resold at retail, while refusing to give the same discounts to other retailers.

D. Issues of Uniform Prices and Wholesaler Costs Were Not Involved.

Since the practice of charging uniform prices to wholesale customers was not an issue at trial, the record also does not appropriately raise the issue of whether uniform prices to wholesalers provide a "safe harbor" from the Robinson-Patman Act when a manufacturer also sells directly to retailers. This is especially true because the little evidence on this issue in the record indicates that Texaco did not charge uniform prices to wholesalers. Similarly, the language in the court of appeals' opinion which Texaco and the Government find objectionable does not involve any dispositive issue. Nothing in the district court's jury instructions predicated liability on findings concerning the costs of Gull or Dompier.[23]

E. The Issue Raised By Texaco and the Government Ignores the Central Facts Relevant to Texaco's Liability, and Is Not Raised In This Case.

Even assuming, *arguendo*, that prior to 1974 Texaco extended the discount only to Dompier acting as a pure wholesaler, the issue Texaco poses is far broader than the actual basis for Texaco's liability in this case. The jury instructions permitted a finding of liability

[23] The Ninth Circuit's language concerning whether the discounts were "cost based" was a response to Texaco's factual argument that wholesale functions performed by Gull and Dompier absorbed the discrimination so that it was not the cause of any impact on the retail level. The courts below responded to this argument by stating that Texaco did not attempt to prove, in any quantitative sense, that the cost of the functions precluded any impact on competition.

based upon Texaco's sales to Dompier as a wholesaler *only* if the jury found that Texaco had *knowledge, before the sale,* that the discount would be passed on to customers competing with the plaintiffs. JA 392-393.

The Justice Department and FTC, in their initial brief, told the Court that this case does *not* present the issue Texaco raises:

> [W]e do not think that this case on its facts presents the broad issue that petitioner discusses (whether a supplier must show that its discounts to wholesalers relative to retailers are cost based). The case instead presents the narrower question whether a supplier, with *actual knowledge* that its wholesaler discount is being passed through and is conferring a competitive advantage on the retailers that are in competition with directly supplied retailers, may be held liable for the resultant competitive injury. . . . The decision below, when read in this limited fashion, does not conflict with the holding of any other court of appeals.

U.S. Cert. Br. 12-14. Indeed, in their initial brief, the Justice Department and the FTC rejected Texaco's statement of the question presented, and restated the issue to add the critical facts of (1) Texaco's knowledge and (2) adverse competitive effects:

> Whether a supplier that offers uniform prices to purchasers at the same level of the distribution chain may be liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), *if the supplier is aware* that an independent wholesaler passes on to retailers a portion of the discount that it receives from the supplier, thereby undercutting the price that the supplier offers directly to retailers *and placing the supplier's retailer customers at competitive disadvantage.*[24]

U.S. Cert. Br. (I) (emphasis added). The Justice Department and FTC did not disagree with the lower court result on this issue. *Id.* at 13-14.

The FTC's position in the initial brief was consistent with its decisions in *Doubleday & Co.*, *Mueller Co.*, and *Boise Cascade*

[24] In their second brief, the FTC and Justice Department deleted the italicized language from the "questions presented," as discussed *infra*.

Corp.,[25] which recognized that proof of competitive injury is the critical factor in applying the Act and refused to adopt a *per se* exemption for wholesale discounts. However, after certiorari was granted, the FTC and Department of Justice reversed their position and urged a *per se* exemption. For reasons that are not explained, their second brief changed the statement of the question presented as set forth in their first brief by *deleting* reference to (1) Texaco's knowledge before the sale of the passing on of the discount, and (2) the resulting competitive injury — the very facts they considered most relevant in their first brief.

The Government's deliberate disregard of these facts in its second brief, and its revision of the question to eliminate them, raise a legitimate question as to the weight to be given the brief and the commitment of the FTC to uphold the spirit and letter of the Act it is supposed to enforce. It also demonstrates that the abstract question posed by Texaco is not properly framed by this record, as the Government itself recognized in its first brief.[26]

[25] *Doubleday & Co.*, 52 FTC 169 (1955); *Mueller Co.*, 60 FTC 120 (1962), *aff'd.* 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *Boise Cascade Corp.*, 107 F.T.C. 76 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988).

[26] By deleting competitive injury from its question presented, the FTC and Justice Department need not address (1) the actual competitive injury suffered in this case; (2) the plain language of the statute proscribing competitive injury caused by "customers" of the favored buyer; (3) the underlying premise of *Doubleday*, *Mueller*, and *Boise Cascade* that the competitive injury component of the proof is highly probative of the Act's application; and (4) the Congressional intent to protect small businessmen from customer level injury. If one focuses on the proof of competitive injury in this case, which in the past has been so important to the Commission, the brief of the United States and the Federal Trade Commission is simply schizophrenic. It simply reads the words "customers of either of them" out of the Act.

The failure to address the significance of Texaco's knowledge of the pass-through of the discount is equally disingenuous. By leaving this fact out of the question presented, the FTC and Justice Department can ignore it in their argument. This is necessary if they are to argue for a *per se* immunity on this record, since they recognized in their first brief that there is no justification for exempting a manufacturer from liability

(footnote continued on next page)

The FTC's current position urging a *per se* exemption stands in marked contrast to that expressed by the thirty-five states that have filed as *amici* in opposition to Texaco. The FTC's concern is with the claimed administrative problems of the price discriminating seller, a concern not expressed in the Act. The states' concern is for the competitive injury suffered by the victim of price discrimination, the very heart of the concern expressed in the Act.

F. The Facts of This Case Do Not Present a Recurring Problem.

The facts here are unique, and are unlikely to recur with any regularity. "[M]arket forces should tend to discourage a supplier from offering independent wholesalers discounts that would allow them to undercut the supplier's own retail customers." U.S. Cert. Br. 15. Moreover, legitimate wholesalers will not ordinarily be able to pass on discounts if they are truly performing the distribution functions for which the discount was intended, and in such instances a manufacturer should be able to claim the statutory "cost-justification" defense. The paucity of cases which have even presented this fact pattern disproves Texaco's claim of a widespread problem. The FTC and the Department of Justice correctly observed in their initial brief that "this case appears to reflect rather anomalous behavior on the part of the supplier," U.S. Br. 17, and that there is an "absence of any reason to believe that the facts of this case are representative of a widespread 'problem' . . . ." U.S. Br. 17.

G. Texaco Has Not Adequately Preserved the Issue It Presents.

At trial, Texaco proposed an instruction based on *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). Texaco's instruction stated that the Act applies where wholesale discounts are passed on to retail customers who thereby gain a competitive advantage over direct-buying retailers. App. A. Texaco objected to the district court's jury instruction, which conformed to Texaco's proposed instruction, only

for the known consequences of its price discrimination. U.S. Cert. Br. 13–14. In their first brief the FTC and Justice Department stated that the judgment below could be justified on the basis of "the narrower rule that a supplier must mitigate the known downstream effect of a passed-through wholesaler discount." *Id.*

on proximate cause grounds, an inherent factual issue. R. 3107-3109. Accordingly, Texaco has waived any objection to liability for sales to wholesale resellers. *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987).

H. The Petition Should be Dismissed.

Because this case does not present the issue Texaco raises, *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969); does not involve a conflict of authority, *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931); is supported by valid grounds unrelated to Texaco's argument, *The Monrosa v. Carbon Black Export*, 359 US. 180, 183 (1959); *Jones v. State Board of Education*, 397 U.S. 31, 32 (1920); and there is serious question whether Texaco even properly raised the issue it presents, *City of Springfield v. Kibbe*, *supra*, the Court should dismiss the petition as improvidently granted, or summarily affirm the judgment below.

II. Texaco's Discounts Were Not Exempt From Scrutiny Under the Robinson-Patman Act.

A. Texaco Seeks A Per Se *Exemption Which Would Contravene the Act's Language and Purposes, and Prior Decisions of this Court.*

1. The Act's Language and Purposes.

The language of the Robinson-Patman Act is simple and straightforward:

> it shall be unlawful . . . to discriminate in price between different purchasers . . . where the effect of such discrimination may be substantially to lessen competition . . . *in any line of commerce*, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, *or with customers of either of them*. . . . (Emphasis added.)

15 U.S.C. 13(a). The Act nowhere mentions an exemption or special treatment for functional or wholesale discounts. Congress adopted

only two defenses to the general prohibition of the Act's language — cost justification and meeting competition — neither of which applies here.

Congress specifically rejected a proposed defense for pricing based on functional levels when the Act was first passed.[27] Even the functional pricing exemption proposed at that time required the seller's prices to be justified under the statute's cost justification defense:

> Differentials between purchasers in each classification as set forth in the above exemption must, of course, be justified by difference in cost as provided by subparagraph (2) below [the cost justification provision of the statute].

H.R. 2287, 74th Cong. 2d Sess. 9 (1936). *See W. Patman, Complete Guide to the Robinson-Patman Act*, 298 (1963).

> The bill neither requires nor compels the granting of discriminations or differentials of any sort . . . It leaves any who wish to do so entirely free to sell to all at the same price regardless of differences in cost, or to grant any differentials *not in excess of such* differences.

Id. at 298 (emphasis added). Before final enactment Congress deleted the proposed functional pricing exemption, leaving the statute's general language and the two statutory defenses. Since then, Congress has repeatedly rejected similar proposals.[28] Thus, the statutory language nowhere supports an exemption for pricing

[27] The original Robinson and Patman bills stated that "nothing herein contained shall prevent differentials in prices as between purchasers depending solely upon whether they purchase for resale to wholesalers, retailers, or to consumers . . . ." H.R. 8442, 74th Cong., 1st Sess., June 11, 1935. The House deleted the proposed functional discount exemptions in response to strong opposition, and the House language was adopted as § 2(a) in conference. *See* 3 Kintner, *Federal Antitrust Law* § 19.2 (1983).

[28] Recent legislative proposals would have required price differences based upon the nature of a buyer's reselling, or would have required greater discounts to wholesalers than to retailers. *See* Hearings on H.R. 3465, H.R. 4151 and H.R. 4529 ("Recent Efforts to Amend the Robinson-Patman Act") (Antitrust Subcomm., House Comm. on the Judiciary,

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by trade or functional levels, and the legislative history reveals that Congress expressly rejected such an exemption.[29]

The Robinson-Patman Act is unique in that Congress' aim was specifically to preserve equal competitive opportunities for small independent merchants faced with competition from larger chain retailers. *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963); *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948). The Act is not generally concerned with the promotion of competition and the efficient allocation of economic resources.[30] "Because the Act is remedial, it is to be construed broadly to effectuate its purposes," and there is a "heavy presumption" against implicit exemptions to its application. *Abbott Laboratories v. Portland Retail Druggists Ass'n*, 425 U.S. 1, 12

August 30, 1961); Hearings pursuant to H. Res. 66, Vol. 2 ("Small Business and the Robinson-Patman Act") (Special Subcom. on Small Business and the Robinson-Patman Act of Select Comm. on Small Business, February 4-6, 26-27, March 3-4 and 11, 1970); Hearings Before Ad Hoc Comm. on Antitrust, The Robinson-Patman Act and Related Matters ("Recent Efforts to Amend or Repeal the Robinson-Patman Act," Parts 1 and 2) (House Committee on Small Business, November 5-6, 11-12 and 19, 1975; December 10-11, 1975; and January 26-27, 1976). *See also* H.R. 2170, 88th Cong., 1st Sess. (1963) and H.R. 12562, H.R. 12688, 94th Cong., 2d Sess. (1976), which would have amended § 2(a) of the Clayton Act to provide for mandatory functional discounts. All were rejected.

[29] This legislative history indicates that Congress intended that "the legitimacy of the practice [of extending functional discounts] depends upon the absence of competitive effects or the presence of the conventional defense, *e.g.*, cost justification." Monograph, *The Robinson-Patman Act: Policy and Law*, Vol. 1 at 58 (ABA Section of Antitrust Law 1980). *Accord*, Calvani, *Functional Discounts Under The Robinson-Patman Act*, 17 Boston Col. Indus. & Comm'l L. Rev. 543, 546 (1976).

[30] A current member of the Federal Trade Commission has observed that

> ". . . [T]he act is not generally concerned with the promotion of competition and the efficient allocation of economic resources. The Robinson-Patman Act is not an "antitrust" act. The conventional concern for efficiencies in production, distribution and marketing that underlies the antitrust laws in general have no paramount significance in this Act."

Calvani, *supra* n.29, at 547. "Thus, while its sister 'antitrust acts' are generally thought to protect competition, the Robinson-Patman Act was drafted and enacted to protect a certain group of competitors." *Id.* at 547, n.20.

(1976). Texaco provides no basis for casting aside this heavy presumption in the facts of this case.

Application of the statute to a dual-distributing seller is neither novel nor unanticipated. In fact, Congress was specifically concerned with situations where dual-distributing sellers sold to large retailer customers at lower prices than to wholesalers, because such discrimination impaired the competitive opportunities of small retailers supplied by the wholesalers. *FTC v. Morton Salt*, 334 U.S. at 43. But nothing in the Act's language or history limits an injured merchant's rights under the Act only to situations where it is a *retailer* who receives the lower price, or to situations where a small retailer purchasing from a *wholesaler* is the injured party. "[N]either the scope nor the intent of the statute was limited to [the] precise situation or set of circumstances" with which Congress was concerned, *Sun Oil Co.*, 371 U.S. at 520. "The Act is of general applicability and prohibits discriminations generally. . . ." *Id.* at 522. "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source," *id.* at 520, and "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Abbott Laboratories*, 425 U.S. at 12; *FTC v. Broch & Co.*, 363 U.S. 166, 168 (1960); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

2. "Functional Discounts" Are Judged By Reference to the Statutory Language.

The language of the statute clearly makes a discrimination actionable where, as here, the effect of a discrimination is felt at the level of the favored purchaser's customer. To hold otherwise, as Texaco proposes, would require the Court to judicially amend Section 2(a) of the Robinson-Patman Act to delete the words "or customers of either of them." No court has ever suggested that this is appropriate. To the contrary, this Court, the FTC and lower courts have recognized that the statutory language and defenses adopted by Congress fully accommodate legitimate functional discounts, without deferring completely to suppliers' labels or a customer's level of reselling, as Texaco proposes.

The FTC has never treated a buyer's trade or functional classification as a *per se* legal defense. It has consistently treated a buyer's functional classification as either a fact relevant to the effect of the discount on competition, or has judged the validity of functional discounts by reference to the statutory cost justification defense. For example, in *Doubleday & Co., Inc.*, 52 F.T.C. 169 (1955), the Commission held that application of the Act to functional discounts depends not on the buyer's functional classification but on the factual issue of whether the size of the discount is reasonably related to the costs of the function actually performed. In *Mueller & Co.*, 60 F.T.C. 120 (1962), the Commission held that even if a functional discount is reasonably related to expenses assumed by the buyer, it can cause competitive injury, and the Act can apply, because the favored buyer can derive substantial benefit to his own business in performing the distribution function. 60 F.T.C. at 127. In its most recent case, *Boise Cascade Corp.*, 107 F.T.C. 76 (1986), *rev'd. on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988), the Commission reaffirmed the *Mueller* holding, and noted that legitimate functional discounts should be protected from liability under the cost-justification defense. The Commission stated that it is the seller's — not the buyer's — costs which provide the basis for the defense. 107 F.T.C. at 211-212.

While *Boise Cascade* did not involve a claim based upon a wholesaler's passing on of a discount, the Commission refused to establish a *per se* exemption in that situation.[31] Lower courts and this Court have similarly held that the Act may apply to discriminatory prices charged to different levels of the distribution chain.[32] This is true both where a direct-buying retailer receives the lower price, *FTC v. Morton Salt Co.* 334 U.S. at 41,[33] and where the direct-buying retailer paid a higher price, as was the case here. *Perkins v. Standard Oil Co.*, 395 U.S. 642; *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).[34]

[31] The FTC said only that "There would *ordinarily* be no violation of the Act if a dual distributor receives the wholesaler discount only on the goods it resells to other dealers . . ." 107 F.T.C. at 215 (emphasis added). Apparently the Commission used the word "ordinarily" to recognize that in some circumstances injury to competition can arise even where the wholesaler only resells at wholesale.

[32] *Calvani, supra* n.29, at 547 ("the appropriate inquiry is whether injury to competition results"); Monograph, *The Robinson-Patman Act; Policy in Law*, Vol. I at 59 (ABA Section of Antitrust Law 1980.)

Texaco is essentially arguing that the Act requires an analysis of whether a discrimination affects competition only at the "discrimination" stage — *i.e.*, whether competition between the two purchasers is affected — and that competitive effects on the level of the purchasers' customers are to be ignored. This Court squarely rejected such an argument in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). The Court held that if competitive effects were to be analyzed at the "discrimination" stage, "every legal controversy over any price difference would shift from the detailed governing provisions — 'injury,' 'cost justification,' 'meeting competition,' 'etc.' — over into the 'discrimination' concept for *ad hoc* resolution . . . ." 363 U.S. at 551. The Court concluded that such a result would be unworkable and inconsistent with the Act's purpose, and that the "discrimination" required by the Act is nothing more than a difference in price. 363 U.S. at 551, n. 20.

In *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), the Court explicitly recognized that competitive injury, not a customer's level in the distribution chain, determines the statute's application. A manufacturer gave promotional allowances to Fred Meyer, a large retailer, but not to other retailers supplied by wholesalers. Fred Meyer argued that there was no violation of the Act because the competing

[33] *See also Jones v. Metzinger Dairy, Inc.*, 334 F.2d 919, 924-25 (5th Cir.), *cert. denied*, 379 U.S. 965 (1965); *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 701-02 (9th Cir. 1964); *Krug v. International Tel. & Tel. Co.*, 142 F. Supp. 230, 235 (D.N.J. 1956); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019 (1976), *cert. denied*, 429 U.S. 1097 (1977); *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942, 950-51 (D. Conn. 1966); *Curtiss Candy Co.*, 44 F.T.C. 237 (1947), *order modified*, 48 F.T.C. 161 (1951).

[34] In *Standard Oil Co. v. FTC* the Seventh Circuit affirmed an order of the Federal Trade Commission prohibiting discounts to jobbers where the discounts affected competition with direct-buying retailers either because the jobbers themselves sold at retail or passed the discount on to their retail customers, finding that the requisite competitive effect could occur even though the direct purchases were on a different level of distribution.

retailers were not "customers" of the manufacturer, even though it was they who suffered the effects of the manufacturer's discrimination. The Court refused to adopt such a narrow reading of the word "customer" in Section 2(d) of the Act, finding it "wholly untenable when viewed in light of the central purpose of § 2(d) and the economic realities with which its framers were concerned." 390 U.S. at 349.

The Court recently confirmed the primacy of the Act's focus on competitive effects in *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). There, a manufacturer charged different prices to wholesalers who did not compete at all. However, the wholesalers' retailer customers did compete with each other. Because the favored wholesaler passed its discount on to its retailer customers in the form of a lower price, competition between the retailers was adversely affected. The Court squarely held that "[t]he competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchasers; it also encompasses the injury to competition between their customers . . . ." 460 U.S. at 436.

In *Perkins v. Standard Oil Co.*, 395 U.S. 642, the Court applied the Act in precisely the situation presently before the Court. Standard Oil sold gasoline to Perkins, a direct-buying retailer, at higher prices than those charged Signal, a wholesaler. Signal sold to another wholesaler, which then sold the gasoline to Regal, a retailer which competed with Perkins. Signal's discount was passed on to Regal, which thereby gained a competitive advantage over Perkins.

Perkins raised the issue of whether the Act applies to cases of "fourth-line" injury — *i.e.*, where the wholesaler's discount has been passed on to a retailer two steps removed from the original recipient. Before even addressing this question, the Court declared that if the discount had been passed on directly from Signal to Regal — exactly the situation involved here — a "clear violation" would exist:

> [T]o read "customer" more narrowly in . . . [§ 2(a)] than we did in the section involved in *Meyer* would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain. Had Signal . . . sold its gas directly to the Regal stations, giving Regal stations a competitive advantage, there would be no question . . . that a clear violation of the Robinson-Patman Act had been committed.

395 U.S. at 647.

The Court went on to hold that fourth-line injury is actionable under the statute, and that any limitation of the Act only to third-line injury (where the discount is passed on from the wholesaler to a retailer) "is wholly an artificial one and completely unwarranted by the language or purpose of the Act." 395 U.S. 647.

> . . . Here, Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act.

395 U.S. at 647–48.[35] The test is whether the discrimination is the proximate cause of the injury, which is a factual determination for the jury. *Id.* at 648.[36]

[35] Texaco's suggestion that *Perkins* was addressing discrimination within the same class of trade, or where the direct-buying retailer paid less than a wholesaler, simply finds no support in the Court's opinion. Nor is there any basis for the Government's suggestion that the Court viewed *Perkins* as a wholesaler itself, or based its opinion on the fact that the two purchasers after the wholesaler were partially owned by the wholesaler. Indeed, Justice Marshall, concurring in part and dissenting in part, specifically objected to the Court's refusal to base its opinion on the more narrow theory that Signal was directly competing with Perkins because it partially owned Regal and the intervening wholesaler. 395 U.S. at 651.

[36] Recent opinions of this Court confirm the continued viability of the principles enunciated in *Perkins*. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981); *Abbott Laboratories v. Portland Retail Druggists Assn.*, 425 U.S. 1, 11–12 (1976). In *Abbott Laboratories*, the Court cited *Perkins* for the proposition that "Robinson-Patman, in particular [is] to be construed liberally, and that the exceptions from [its] application are to be construed strictly."

In 1976, Congress considered legislation to amend or repeal the Act. In hearings, Congress was told about the holding of *Perkins v. Standard Oil Co.* by former FTC Chairman Earl W. Kintner. Hearing Before Ad Hoc Comm. on Antitrust, The Robinson-Patman Act and Related Matters

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3. "Independent Pricing Decisions" By Customers Do Not Preclude Application of the Act.

Texaco contends that independent pricing decisions by the favored buyer negate, as a matter of law, the causal connection between a seller's price discrimination and the injury to competition where the effect of the discrimination is felt at the customer level. If this were true, the Act would have little or no application. In any case of second-line or third-line injury, the existence of adverse competitive effects will depend upon whether the favored purchaser chooses to use its discount to reduce its resale price. In *Falls City*, for example, the price discrimination was actionable only because the favored wholesaler first chose to pass the discount on to its customers, and its customers then chose to reduce their retail prices. 460 U.S. at 434. As *Perkins*, *Falls City* and *Fred Meyer* all indicate, the question under the statute is not how a buyer resells, but whether there is a causal connection between the price discrimination and competitive injury. That factual issue was properly resolved in the plaintiffs' favor here. *Perkins*, 395 U.S. at 647-48.

B. Compliance With the Act is Not Burdensome or Impossible or In Conflict With The Sherman Act.

1. Texaco Had Lawful and Practical Options to Eliminate the Price Discrimination.

A dual-distributing manufacturer's own self-interest will ordinarily protect it from claims of the kind represented by this case, since it should ordinarily have no legitimate incentive to extend wholesalers discounts of a size which will injure directly-supplied

("Recent Efforts to Amend or Repeal the Robinson-Patman Act - Parts 1 and 2") at 244-245 (House Comm. on Small Business, 94th Cong., November 5, 6, 11, 12 and 19, 1976). With the holding of the Court in *Perkins* as part of the legislative history, Congress refused to repeal or amend the Act. Texaco would thus have this Court overrule its precedent where Congress has refused to do so.

The rule of *stare decisis* is particularly strong in situations of statutory construction, especially where Congress has refused to adopt interpretations or limitations urged on the Court. *Patterson v. McLean Credit Union*, 491 U.S. ____, 105 L. Ed. 2d 132, 148-149 (1989).

retailers. However, if a supplier observes over a sustained period of time that wholesalers are not using the full discount, but are passing it on to retailers who use it to the disadvantage of direct-buying retailers, the manufacturer has several reasonable and lawful options for complying with the Act. The manufacturer can, for example, (1) raise the wholesaler's price, (2) reduce its price to direct-buying retailers, or (3) do a combination of the two.

In 1976-77, when Texaco eventually admitted that its discount was severely impacting direct-buying retailers, JA 407-414, Texaco considered these options and others as well, including adoption of a pricing system based on services performed, and counseling wholesalers to return to the performance of the wholesale functions which had formerly justified the distributor discount. JA 230-234, 417-423, 477-482. None of these alternatives, available to any supplier, requires a supplier to control resale prices, monitor costs, or abandon sales to wholesalers.

2. Application of the Act Does Not Make Sellers Responsible For Conduct Over Which They Have No Control.

Texaco also complains that if the Act is applied to dual-distributing sellers, the seller will not know about a problem in its pricing structure in time to correct it, and that the seller should not be responsible for the pricing decisions of its customers. This abstract premise also ignores the facts of the case before the Court. Other lawsuits similar to this had been filed against Texaco well before this case was brought, so Texaco could hardly have been taken by surprise by complaints about its pricing system in Spokane.[37] Moreover, Texaco *knew* the discount was being passed on to Dompier's customers, and in fact it could hardly fail to know it, since it was obvious from the retail prices posted by Dompier's customers

[37] *See, e.g., Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.) *cert. denied*, 408 U.S. 928 (1972); *Stanton v. Texaco, Inc.*, 289 F. Supp. 884 (D. R.I. 1968); *McCaskill v. Texaco, Inc.*, 351 F. Supp. 1332 (S.D. Ala. 1972); *Cadigan v. Texaco, Inc.*, 492 F.2d 383 (9th Cir. 1974). Like *Hasbrouck*, the cases were not defended on the basis of the legitimacy of the discount, but on the failure to prove sales interstate commerce, meeting competition, and failure to prove lost sales and profits.

stations.[38] Texaco's Spokane sales representative testified to management discussions as early as 1971 about the fact that Dompier was passing the discount on to its customers, who were undercutting the plaintiffs' retail prices. JA 268-269, 331-334.

Thus, the argument that a supplier should ordinarily not be liable for the downstream effects of differential pricing ignores the fact that knowledge by the seller was required. Moreover, in the real world a wholesaler can only pass on a significant part of a price discount for a significant period of time if the discount is unduly large in relation to the functions the wholesaler is actually performing. It is the unjustified size of the discount which *in fact* causes the injury. Here the jury could find Texaco liable only if it found all of the elements of a violation and that Texaco knew *before the sale* that the discount would be passed on to the disfavored purchaser's competitor. If the price discount is so great as to satisfy all of these requirements, and Texaco knew of the conduct before the sale, then it is logical to conclude that the unreasonable magnitude of the discount is the cause of the disfavored purchaser's injury. The seller has complete control over the magnitude of the discount

3. Sellers Do Not Have To Monitor Wholesale Costs.

If a manufacturer's discount to a wholesaler is truly designed to compensate the wholesaler for performing functions which the manufacturer would otherwise perform, the manufacturer will necessarily have a good idea of the costs of performing those functions. Thus, the manufacturer should be able to establish a functional discount in a realistic and reasonable amount, and will have a natural incentive to do so. The cost-justification defense fully protects a manufacturer who sets his price in this manner.

Moreover, the fact that compliance with the Act may impose some burdens on the seller — for example, the burden to verify that wholesalers are in fact performing wholesale functions — does not justify a blanket exemption from the Act. This Court has recognized

[38] For example, when the Dompier-supplied station on Monroe Street opened in 1971, the retail price posted by the Dompier station was $\frac{9}{10}$ of a cent above plaintiff Hank Riggs' cost. *Id.* 44.

that implementation of Congress' purpose may place affirmative burdens on sellers to determine the nature of their customers' conduct. *Abbott Laboratories v. Portland Retail Druggists Ass'n.*, 425 U.S. 1, 20-21 (1976).

Furthermore, a dual-distributing seller can comply with the Act simply by focusing on the impact of his differential pricing on competition in the retail market. If the seller observes, or from complaints or market sources learns, that direct-buying retailers are being affected by inappropriate wholesale discounts, as Texaco observed in Spokane, the seller can and should adjust the price to eliminate the injury, and in fact should have every incentive to do so even absent the Robinson-Patman Act. A purchasers' costs are relevant only to the extent they may eliminate the effect of a discrimination by absorbing it.[39]

4. Sellers Will Not Have To Abandon Dual Distribution.

Although the FTC has applied the Act to preferential wholesale discounts ever since its *Doubleday* opinion 34 years ago, and this Court decided *Perkins* more than 20 years ago, the parade of horribles envisioned by Texaco has not occurred. Manufacturers still engage in dual distribution, and have not abandoned wholesalers or refused to sell directly to retailers. U.S. Br. 20. Although a true system of equal prices for all purchasers performing the same functions would promote marketing efficiencies far better than Texaco's rigid system of trade discounts, it is by no means required. Here, Texaco continued its dual distribution even after it knew of adverse claims by direct-buying retailers, and recognized that it could comply with the Act simply by adjusting its prices. It saw no overwhelming difficulties in doing that, and there are none.

[39] Since Texaco need not adjust wholesaler prices based on individual wholesaler costs, Texaco's stated concern about exposure to wholesalers' Robinson-Patman suits is misplaced. It is worthy of note that concern about wholesaler suits did not prevent Texaco from discriminating in price between Gull and Dompier.

C. Texaco's Proposed Per Se Exemption for "Uniform Wholesale Prices" is a Formalistic Standard Which Would Reward Inefficiencies and Facilitate Avoidance of the Act's Purposes.

Texaco and the Government argue that where a supplier sells to both retailers and wholesalers, a *per se* exemption is necessary as a "safe harbor" or "firm line" for suppliers who charge uniform prices to wholesalers. Such a "safe harbor" is meaningless in terms of the Act's language and purposes. In the "reverse trade discount" situation (*e.g., Morton Salt*), to which Texaco and the Government concede the Act applies, the supplier presumably charges all wholesale resellers the same price. But the Court has nonetheless recognized that the proscribed customer-level effects of differential pricing between wholesalers and direct-buying retailers may be present, and that if they are, the Act applies. There is no logical distinction which justifies ignoring the same kind of effects, on the same kind of competitor, just because it is a *direct-buying* retailer, rather then a retailer buying from a wholesaler, who was injured.

The district court and court of appeals both recognized, as has the FTC, that a supplier's functional discounts will ordinarily present no problem of a Robinson-Patman violation because they will be justified under the cost justification defense and will not produce adverse competitive effects. PA-9; PB-3. But it is not the fact of price uniformity which is responsible for the absence of adverse effects. If a supplier extends all wholesale resellers the same discount, the uniformity of the discount is meaningless where, as here, some or all of the wholesalers do not perform the functions which justify the discounts, or if the size of the discount bears no relation to the functions they do perform. The adverse effect on direct-buying retailers is the same. Here, for example, the effects on the plaintiffs would not have differed if Texaco had given other distributors and Dompier the same discount. The proposed safe harbor for "uniform wholesale prices" is a "meaningless mechanical word formula" unrelated to practical realities, of a kind which this Court has repeatedly rejected. *FTC v. Sun Oil Co.*, 371 U.S. 505, 526 (1963).

The competitive injury standard which Congress adopted as the touchstone of Robinson-Patman liability facilitates the Act's policy and purposes by precluding artificial distinctions which would otherwise limit or (as Texaco proposes) completely eliminate the reach of the statute. A *per se* exemption for wholesale discounts, which completely ignores the competitive effects test, "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." *Perkins*, 395 U.S. at 647. For example, a manufacturer could favor particular customers simply by having them supplied through "wholesale distributors" who do nothing more than receive and pay invoices, with the manufacturer drop-shipping to the favored customer. Or the manufacturer could give a wholesaler selling to favored customers a large discount unrelated to functions performed, knowing that the wholesaler will pass on the the discount to the favored recipient.[40] Both occurred here, and both can have enormous competitive effects, as the facts of this case show. Neither result was intended by the language or spirit of the Act.

Texaco's argument is based on its own ideas of sound economic philosophy rather than an application of the statute. As such, it is irrelevant to the Court's function. Congress had sound reasons for enacting a statute to protect small, independent merchants such as the plaintiffs. Although this policy may be considered unwise, or bring with it some inefficiencies, that is a choice for Congress, not the courts, to make. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 57 U.S.L.W. 4951, 4956 (June 26, 1989). The court is not free to apply or not apply the Act on the basis of its own economic predilections. *Sun Oil Co.*, 371 U.S. 505, 519.

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[40] For example, assume that in this case, Texaco had given Gull and Dompier a discount of 25¢ per gallon. No one would seriously contend that such a discount is justified, even if it were given uniformly to all wholesale customers (but not the plaintiffs). Its adverse effects on the plaintiffs would be obvious. Yet if the argument of Texaco and the *amici* were adopted, the discount would be wholly exempt from the scrutiny of the Act.

> We are not interpreting a broadly phrased constitutional provision but rather a narrowly worded statutory enactment with specific prohibitions and specific exceptions.

Id. at 528. Where, as here,[41] Congress has repeatedly rejected statutory amendments to do what Texaco proposes, the Court "will not now achieve the same result by reinterpretation in the face of Congress' failure to pass the bills thus brought before it. . . . [T]hat is a question of policy for Congress." *FTC v. Ruberoid Co.*, 343 U.S. at 479. *See also Falls City Industries, Inc. v. Vanco Beverage*, 460 U.S. 428, 436 (1983) ("The determination whether to alter the scope of the Act must be made by Congress, not this Court . . . .").

Moreover, there is no sound economic basis for a rule permitting manufacturers to set prices to different categories of resellers without regard to competitive effects. As this case plainly demonstrates, no relationship necessarily exists between the method of a customer's reselling and marketing functions performed. Retailers as well as wholesalers should be encouraged to vertically integrate if they can efficiently do so. A formalistic exemption based on the character of a customer's reselling, however, would stifle vertical integration since direct-buying retailers could never qualify for price discounts no matter how many distribution functions they performed. Nor would such an exemption promote wholesaler efficiency or integration, because the wholesaler's entitlement to a discount would not depend on his performance of any particular functions. What incentive would a wholesaler have to become more efficient or take on new functions if he continues to receive a discount irrespective of whether he performs wholesale functions, and irrespective of whether the discount bears a reasonable relationship to the functions he does perform? As this case shows, the wholesaler's incentive in such a situation is to *abandon* wholesale functions (because there is no consequence to him) and to enlarge his market share and profits at the expense of direct-buying retailers by (1) passing the discount on to retailer customers, or (2) himself selling at retail, using the discount to gain an unfair competitive advantage.[42]

[41] *See* note 28, *supra*.

[42] A former official of the Federal Trade Commission has characterized Texaco's discounts to Gull and Dompier as unjustified trade discounts.

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III. The Courts Below Properly Applied the Morton Salt Inference of Competitive Injury.

In *F.T.C. v. Morton Salt Co.*, 334 U.S. 37, this Court held that a persistent and substantial price discrimination gives rise to an inference of competitive injury sufficient to support a prima facie case under the Act. Texaco argues that the district court's jury instructions improperly permitted the jury to infer competitive injury under *Morton Salt*. P. Br. 28–29. This argument is an afterthought which was not raised in the courts below, and therefore is not properly before this Court. *City of Springfield v. Kibbe*, 480 U.S. at 259. Texaco did not object to the district court's jury instruction based on *Morton Salt*, R. 3111, and did not assign any error to the instruction in the court of appeals. Indeed, Texaco's brief in the court of appeals nowhere mentions, much less discusses, *Morton Salt*.

The district court's instruction was, in any event, proper. *Morton Salt* holds "what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." 334 U.S. at 46–47. The logic of this inference applies not only where the competitive effect is felt at the level of the favored and disfavored purchasers, but also where it is felt at the level of their customers, even if the favored and disfavored purchasers are not themselves in competition. *Falls City*, 460 U.S. at 436. If the disfavored buyer in fact competes with the recipient of the discount, he suffers the same competitive disadvantage which the Court identified in *Morton Salt* irrespective of whether the favored buyer is a wholesaler and the other a retailer. To hold otherwise would honor form over substance.

rather than legitimate functional discounts. He concluded that no special protection should be extended to trade discounts, since they are often manifestations of economic price discrimination, stifle efficient innovation in distribution, and create perverse economic incentives. A. Celnicker and B. Seaman, *Functional Discounts, Trade Discounts, Economic Price Discrimination and the Robinson-Patman Act*, Utah L. Rev. 1989, Vol. 4 (forthcoming Nov. 11, 1989).

Boise Cascade Corp. v. Federal Trade Commission, 837 F.2d 1127 (D.C. Cir. 1988), does not cast doubt on application of the *Morton Salt* inference here. To the contrary, the court found that "[t]he *Morton Salt* inference is . . . alive and well in the law," 837 F.2d at 1139, and was "properly relied upon . . . to establish a *prima facie* case of competitive injury." *Id.* at 1146 n.16. The court remanded the case to the FTC for further proceedings because there was no evidence that disfavored buyers had lost sales to Boise, *id.* at 1135, 1145, and because the Commission had not considered evidence which Boise offered to rebut the *Morton Salt* inference of competitive injury under the Act. *Id.* at 1144-46. Here, unlike in *Boise Cascade*, there was direct and substantial evidence of injury to competition and displaced sales, and Texaco had ample opportunity to introduce evidence to show that competition was not affected by its discrimination.

IV. The Damage Award In This Case Met The Standards Of *J. Truett Payne Co. v. Chrysler Motor Corp.*

A. *The Jury Was Properly Instructed on Injury to Competition.*

The district court instructed the jury that to prove a violation, the plaintiffs had to establish that the discrimination in price had a reasonable "probability" of substantially lessening competition.[43] Texaco asserts the district court should have charged the jury that plaintiffs had to prove an actual injury to competition. In *J. Truett Payne*, 451 U.S. 557, 561-562, this Court stated that the Act is violated if there is a showing that "the effect of such discrimination may be substantially to lessen competition." Thus, a plaintiff need show only "a reasonable possibility that a price difference may harm competition." *Falls City*, 460 U.S. at 434-35 (citing *Corn Products Refining Company v. FTC*, 324 U.S. 726, 742 (1945)). The instruction was correct under these precedents.

[43] Instruction 21, which was the elements instruction under the Act, in fact, held plaintiffs to a higher standard of *probability*, not possibility.

B. *The Jury Was Properly Instructed on Proximate Cause.*

Texaco complains that it should not be liable for the pricing decisions of Dompier and its customers. This is a question of proximate cause which was appropriately submitted to the jury. *Perkins v. Standard Oil Co.*, 395 U.S. at 648. A plaintiff need not prove that the violation of the statute was the sole cause of its injury. "It is enough that the illegality is shown to be a material cause." *Zenith Radio Corp. v. Hazeltine Research [Inc.]*, 395 U.S. 100, 114 n.9 (1969). The court's instructions taken as a whole correctly reflected these legal principles. JA 383, 397, 399-401. *See* Section II.B.2 *supra*.

C. *The Jury Properly Considered Evidence of What Plaintiffs' Situation Would Have Been Absent the Violation.*

Texaco argues the lower courts misapplied *J. Truett Payne* because the jury was allowed to consider, for purposes of awarding damages, that Texaco may have remedied the price discrimination by lowering its price to the plaintiffs. The district court and court of appeals correctly rejected this argument. PA-15-17, PB-14.

1. Texaco argues that the plaintiffs had to prove damages based solely on the artificial assumption that Texaco would have eliminated the price discrimination only by raising its price to Dompier and Gull. This is totally inconsistent with *J. Truett Payne's* reaffirmation that the jury is to estimate "what plaintiff's situation would have been in the absence of defendant's antitrust violation." 451 U.S. at 566. The Government disagreed with Texaco, U.S. Cert. Br. 8, and recognized that the question of what would have occurred in the market absent discrimination is inherently factual.[44] Moreover, the plaintiffs' damages were not based only on an assumption that Texaco would have lowered their price.

[44] Unlike both *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381 (8th Cir. 1987) and *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985), cited by Texaco, here plaintiffs' damages did not rest on only one presumed theory that plaintiffs would have received Dompier's price.

Through their economist and other evidence, the plaintiffs provided the jury with six alternative economic projections of what would have occurred in a violation-free market. One of the alternatives was based on an elimination of the discrimination by a reduction in the plaintiffs' price. This was appropriate since Texaco's own business records showed this was one of the options it considered to correct the discrimination.[45] However, the plaintiffs' damages calculations also permitted the jury to award damages based on the removal of the discrimination by increasing the distributor price, or by a combination of a reduction in the plaintiffs' price and an increase in the distributor price, which were alternatives Texaco also considered.

The six different market analyses were comparable to that accepted by the Court in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 257-59, *reh'g denied*, 327 U.S. 817 (1946), where the plaintiffs estimated damages by comparing their profits to those of a competitor who was not subject to the violation. The damages calculation based on the alternative of lowering the plaintiffs' price did not represent an "unlawful overcharge." It represented damages based on Texaco's own analysis of its options.

2. Texaco also argues that the plaintiffs' damage measures improperly assumed they should have received Dompier's entire discount, rather than the price paid by Dompier's customers. This is simply incorrect. The plaintiffs' damage calculations did not presuppose that the plaintiffs would receive the same price as Dompier when Dompier was selling gasoline to competing retail stations. In that circumstance the damage analysis was based only on the difference between the plaintiffs' price and the price paid by the stations Dompier supplied. R. 1797, 2154, 1805-06, 1891, 1907, 1911, 1914-15, 1928-30, 1937-39, 1942, 1946, 2006, 2131.

[45] *See* JA 477-482, Ex. 1 (unexcised version contained in App. A to Respondents' Brief Oppos. Cert.). Texaco discussed reducing its price to retailers such as plaintiffs with the Federal Energy Administration. Ex. 1, p. 4. This portion of the unexcised exhibit was properly considered by Dr. Leffler in arriving at his expert opinion concerning how Texaco most likely would have eliminated the discrimination. *See* Fed. R. Evid. 703.

3. Texaco's argument that Exhibit 912 was an improper "automatic damages" exhibit is equally without merit. Exhibit 912, which aggregated the total dollars paid by plaintiffs in excess of the prices paid by Dompier or its customers, was not offered as a calculation of damages. R. 1722-1728. The trial court specifically instructed the jury, both when the exhibit was admitted, R. 1723, and at the conclusion of the case, JA 403-404, that the plaintiffs could not prove damages merely by showing the amount of the discrimination.

4. Any argument that the courts below misapplied *J. Truett Payne* should also be rejected because Texaco failed to object to the district court's damage instructions, R. 3134-36, did not object to the testimony of the plaintiffs' economic expert or to the plaintiffs' damage exhibits, and presented no alternative measure of damages. Texaco merely objected to the damage exhibits for "lack of foundation." R. 1754-56, 1761, 1763, 1773. Texaco thus waived its assertions of error. Fed. R. Evid. 103(a).[46]

CONCLUSION

Texaco preserved no factual issue for review by this Court. It raises no objection to the giving or failure to give any jury instructions. Its plea to this Court is for immunity from the consequences of its knowing and deliberate price discrimination even though the Congress authorized no such immunity from the reach of its statute. The Court should defer to the Congress by applying the plain language of its statute, and affirm this judgment. The plaintiffs have proven a strong case of liability and damages in reliance on the plain language of the statute and this Court's clear precedent in *Perkins*. They had to try the case twice because this Court in *J. Truett Payne* rejected the Ninth Circuit's damage rule after the first trial and before the first appeal was final. This Court

[46] Moreover, since Texaco failed to provide an alternative damage theory, it is precluded from arguing that any other theory of damages might have been more reasonable. *Handguards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1297 (9th Cir. 1984), *cert. denied*, 396 U.S. 1012 (1985).

should not ignore the public's reliance on its precedent where the attack on the precedent is based on differences of opinions about economics, and not on contrary legal precedent. Fourteen years of litigation in reliance on sound precedent does not deserve a further change in the law. Let the verdict stand.

Respectfully submitted, this 6th day of September, 1989.

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APPENDIX A

JURY INSTRUCTION NO.____

In order to recover on a claim of unlawful price discrimination under the Robinson-Patman Act, each plaintiff must establish each of the following elements by a preponderance of all the evidence:

(a) that Texaco sold gasoline to a plaintiff and to Dompier and Gull at or about the same time and under identical market conditions;

(b) that in all instances the gasoline purchased was of like grade and quality;

(c) that Texaco charged the plaintiff a higher price than it charged Dompier or Gull;

(d) that Dompier and Gull passed along the lower price to their customers;

(e) that those customers, who are service stations, reflected that lower price they may have received in their price to motorists;

(f) that the difference in prices resulted in an actual lessening or destruction of substantial competition between the plaintiffs and service stations who were customers of Dompier and Gull;

(g) that the price differences caused plaintiff to lose profits that otherwise he would have enjoyed; and

(h) that as a result of price differences and their effect on competition, each plaintiff's damages may be determined with reasonable certainty and without guesswork.

Each plaintiff must prove every one of these claims by a preponderance of the evidence, or you must find for Texaco.

In addition, Texaco has offered two defenses to plaintiff's claims under Section 2(a) of the Robinson-Patman Act. If Texaco proves either of these defenses, then each plaintiff cannot recover on its claims under Section 2(a) of the Robinson-Patman Act.

For the first defense, Texaco must show that the higher prices to plaintiffs were justified by higher costs involved in serving those customers.

For the second and entirely separate defense, Texaco must show that any lower prices to Dompier Oil Company or Gull Oil Company were offered in good faith to meet specific competition or else Texaco would have lost the sale.

15 U.S.C. 13; *J. Truett Payne v. Chrysler Motor Corp.* (1981) 451 U.S. 557; *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648–9; *Roorda v. American Oil* (W.D.N.Y. 1981) 1981-1 CCH Trade Cas. ¶ 64, 153; *Bel-Aire Markets v. Foremost Dairies, Inc.* (N.D. Cal. 1972) 55 F.R.D. 538.

[District Court Clerk's record entry No. 671 filed May 29, 1985]